The Employer-Employee Relationship*

EDWIN R. TEPLE†

Everyone works for someone else in one way or another. At one time, perhaps, it didn't much matter what the working relationship between two parties was. But in modern times, what with the problems of tort liability, taxation, and the various measures for the welfare of the working man, the question of who works for whom poses a problem of considerable significance.

Unfortunately, the significance of the problem is matched by the difficulty of its solution. There is a growing field of borderline cases in which the accepted tests simply do not offer a clear-cut answer. Many relationships are like the swoose, which had unmistakable characteristics of both the swan and the goose. Neither the courts nor the legislatures have yet devised a yardstick equal to the task of unerringly separating the swans from the geese and at the same time cataloguing their hybrid offspring with any degree of uniformity.

Most of the Federal acts which deal with matters affecting the working relationships between individuals do not attempt to give a complete definition of the term employee. The National Labor Relations Act provides that the term "employee" shall include any employee, and shall not be limited to the employees of a particular employer.[1] The same term in the Fair Labor Standards Act "includes any individual employed by an employer,"[2] and the word "employ" is defined to include "to suffer or permit to work."[3] The Social Security Act and its companion provisions in the Internal Revenue Code originally provide merely that the term "employee" includes an officer of a corporation.[4]

The United States Supreme Court, in decisions applicable to all three statutes, has sought to give a more definite and realistic meaning to the term "employee" by referring to the purpose of the act and the mischief to be corrected in each instance. In *N.L.R.B.* v. *Hearst Publications*,[5] in the course of holding that newsboys were

* The views expressed herein are entirely those of the author and are not intended to reflect in anyway the official viewpoint of the Federal Security Agency.

† Assistant Regional Attorney, Region IV, Federal Security Agency.

[1] 49 STAT. 450 (1935), 29 U.S.C.A. 152 (3) (1947).

[2] 60 STAT. 1095 (1946), 29 U.S.C.A. 203 (e) (1947).

[3] 60 STAT. 1095 (1946), 29 U.S.C.A. 203 (g) (1947).

[4] 60 STAT. 986 (1946), 42 U.S.C.A. 1301 (a) (6) (1947); 62 STAT. 438, 26 U.S.C.A. 1426 (d) (1948); 62 STAT. 428, 26 U.S.C.A. 1607 (i) (1948).

[5] 322 U.S. 111 (1944).

employees rather than independent contractors under the National Labor Relations Act, the court said that the meaning of the term in doubtful situations should be determined by underlying economic facts rather than by traditional legal distinctions developed for other purposes, and that where the relationship was of the type which needed protection, protection ought to be given.[6] In *United States* v. *Silk*[7] and *Rutherford Food Corporation* v. *McComb*,[8] the court said that the same rule should be applied to the Social Security Act and the Fair Labor Standards Act respectively, and that the term "employee" included workers who were such as a matter of economic reality.[9]

In the *Rutherford Food Corporation* case, beef boners using the premises and equipment of a slaughter house for a specialty job on the production line closely related to other slaughter house activities, were found to be employees. In the *Silk* case,[10] after stating that degrees of control, opportunities for profit or loss, investment in facilities, permanency of the relation and skill required in the claimed independent operation are important for a decision, the court determined that coal unloaders, who had often been held to be employees in tort cases, were employees for the purpose of social security legislation as well, but that truck driver-owners, despite the fact that they were integral parts of the businesses involved and notwithstanding a long list of tort and workmen's compensation cases holding that driver-owners were employees, were independent contractors for this purpose.

The court was unanimous with regard to the principles stated in the *Silk* opinion, but that they are something less than a touchstone is demonstrated rather clearly by the fact that four of the justices disagreed with the result insofar as the truck driver-owners were concerned. In a masterpiece of brevity, Justice Black,

---

[6] Compare Robinson v. Baltimore & Ohio R. Co., 237 U.S. 84, 94 (1915), relied upon by the Court of Appeals, where it was said that Congress in using the words "employee" and "employed" in the Federal Employer's Liability Act, intended to describe the "conventional relation of employer and employee."

[7] 331 U.S. 704 (1947).

[8] 331 U.S. 722 (1947).

[9] The lower courts had not been nearly so certain about the intent of Congress with regard to the language used in the Fair Labor Standards Act. Some of them felt that the traditional tests of the employer-employee relationship were not applicable. Walling v. Wabash Radio Corp., 65 F. Supp. 969 (S.D. Mich. 1946); Fleming v. Demeritt, 56 F. Supp. 376 (Vt. 1944). Others were equally certain that there was no intention of abrogating the usual and accepted concepts of the relationship. Dugas v. Nashau Mfg. Co., 62 F. Supp. 846 (N.H. 1945); Shropfer v. A. S. Abell Co., 48 F. Supp. 88 (Md. 1942), *aff'd* 138 F. 2d 111, *cert. denied*, 321 U.S. 763 (1943).

[10] The case of Harrison v. Greyvan Lines, Inc. involving the owner-drivers employed in Greyvan's moving business, was combined with the case involving the unloaders and owner-drivers engaged in the coal business of Albert Silk.

Douglas, and Murphy simply said that in their view the applicable principles of law laid down by the court required a finding that the driver-owners as well as the unloaders were employees. Justice Rutledge favored remanding the causes to the District Court for a determination of the factual issue regarding the driver-owners in accordance with the principles stated in the majority opinion.

For whatever they were worth, the Bureau of Internal Revenue sought to incorporate the Supreme Court's principles in its Employment Tax Regulations by a proposed amendment published in the Federal Register on November 27, 1947. At this point, Congress appeared on the scene and proceeded in the so-called "Gearheart Resolution," after a long and interesting debate, to "preserve the status quo" by adopting in resolution form the following new language to be added to the definition of "employee" in the Social Security legislation: "but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules."[11]

Of course there is no fixed, easily applied common law rule. The nearest thing to it is the control test which a great many courts apply as the exclusive criterion but with results which are far from uniform. The true picture was accurately described by the Supreme Court in the *Hearst* case when it said that the simplicity of the test was illusory because it was more largely simplicity of formulation than of application. In the words of the court: "Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing. This is true within the limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction."[12]

Actually, the control test was originally formulated in connection with the determination of tort liability, where the only concern of the court was whether one individual could properly be held responsible for the acts or omissions of another.[13] In other fields, where the problem is fundamentally different, there is no reason why more appropriate and, if possible, more practical stand-

[11] Public Law 642, 80th Congress (June 14, 1948), 62 STAT. 438, popularly known as the Gearheart Resolution.

[12] 322 U.S. at 120.

[13] Asia, *Employment Relation*, 55 YALE L. J. 76 (1945); Wolfe, *Determination of Employer-Employee Relationship in Social Legislation*, 41 COL. L. REV. 1015 (1941).

ards should not be applied. In the interpretation of language which is no more specific than that in the statutes already referred to, the courts in reality are formulating new or expanded common law standards which are entitled to at least as much respect as the criteria previously devised for other purposes. The common law is not static but is a flexible, constantly expanding body of law. Were this not so, the control test itself would never have seen the light of day.

The Federal courts have not been entirely in accord in their views concerning the effect of the Gearheart Resolution. The 4th Circuit, in *Ewing* v. *Vaughan*[14] said that the "economic reality" concept was reversed by Congress; and the 7th Circuit, in *Party Cab Co.* v. *U.S.*,[15] declared that the Supreme Court in the *Silk* case had interpreted the term "employee" so as to encompass an area considerably greater than a court would now be justified in doing. In *Crossett Lumber Co.* v. *U.S.*,[16] however, the District Court for the Western District of Arkansas, after a full appraisal of the entire history of the problem under the social security legislation, concluded that the proper test was whether, as a matter of actual reality, the employer controlled or had the right to control the performance of the services in question, taking into account the purpose of the act and the considerations outlined by the Supreme Court in the *Silk* case. In *U.S.* v. *Kane*,[17] the 8th Circuit recognized that the *Silk* case "must be read in the light of the joint reslution of Congress," but nevertheless held that so-called coal jobbers engaged by a retail coal company to store coal were employees, finding that the right to control was effectively preserved through exercise of the right of the company to hire and fire.[18]

The Federal precedents demonstrate the lack of uniformity which exists in the application of the statutes referred to above. Home workers, who are generally paid by the piece or the job, have been considered employees in some cases[19] and independent

---

[14] C.C.H., U.I. Serv., Fed., par. 9343 (1948), in which a so-called broker engaged in selling flour at fixed amount per hundredweight was held to be an independent contractor.

[15] C.C.H., U.I. Serv., Fed., par. 9363 (1949), in which taxi drivers who operated cabs owned by a cab company under oral agreements which extended only from day to day were held to be independent contractors.

[16] C.C.H., U.I. Serv., Fed., par. 9344 (1948), in which logging contractors were held to be independent contractors rather than employees of the lumber company.

[17] C.C.H., U.I. Serv., Fed., par. 9355 (1948).

[18] In reliance upon the earlier case of Grace v. Magruder, 148 F. 2d 679 (1945), the court stressed the fact that the storing of coal in the bins was necessary part of the company's continuing business and that the nature of the simple work and tools used herein obviated the necessity for supervision or direction at the place of work.

contractors in others.[20] Similar inconsistency has befallen taxicab drivers,[21] truck drivers,[22] entertainers,[23] miners,[24] lumbermen,[25] filing station operators,[26] and salesmen.[27] The history of the control test gives little hope of improvement.

---

[20] Walling v. American Needlecrafts, Inc., 139 F. 2d 60 (6th Cir. 1943); Schwing v. U.S., 165 F. 2d 518 (3d Cir. 1948).

[20] Glenn v. Beard, 141 F. 2d 376 (6th Cir. 1944).

[21] Employees: Jones v. Goodson, 121 F. 2d 176 (10th Cir. 1941); Kaus v. Huston, 120 F. 2d 183 (8th Cir. 1941); Checker Taxi Co. v. Harrison, C.C.H., U.I. Serv., Fed., par. 5054.86 (1942); Michigan Cab Co. v. Kavanagh, C.C.H., U.I. Serv., Fed., par. 5054.86 (1941). Independent Contractors: Davis v. U.S., 154 F. 2d 314 (App. D.C. 1946); Magruder v. Yellow Cab Co., 141 F. 2d 324 (4th Cir. 1944); Woods v. Nicholas, 163 F. 2d 615 (10th Cir. 1947); Party Cab Co. v. U.S., C.C.H., U.I. Serv., Fed., par. 9363 (1949); Co-op Cab Co. v. Allen, C.C.H., U.I. Serv., Fed., par. 5054.87 (D.C. Ga. 1947).

[22] Employees: Grand Rapids Gravel Co. v. U.S., C.C.H., U.I. Serv., Fed., par. 5054.90 (D.C. Mich. 1943); *In re* Hiner, C.C.H., U.I. Serv., Fed., par. 5054.90 (D.C. Ind. 1941); Willard Sugar Co. v. Gentsch, C.C.H., U.I. Serv., Fed., par. 5054.90 (D.C. Ohio 1944). Independent Contractors: U.S. v. Silk, 331 U.S. 704 (1947); U.S. v. Mutual Trucking Co., 141 F. 2d 655 (1944); Burruss v. Early, 44 F. Supp. 21 (W.D. Va. 1942). See also *Re* Barbour Transportation Co., C.C.H., U.I. Serv., Fed., par. 5054.91 (D.C. Okla. 1947) (Drivers operating under one type of contract were held to be employees and those operating under slightly different terms were considered independent contractors.)

[23] Employees: Matcovich v. Anglim, 134 F. 2d 834 (9th Cir. 1943) (Taxi dancers). Independent Contractors: Radio City Music Hall Corp. v. U.S., 135 F. 2d 715 (2d Cir. 1943) (Special performers and artists).

[24] Employees: N.L.R.B. v. Blount, 131 F. 2d 585 (8th Cir. 1942). Independent Contractors: Anglim v. Empire Star Mines Co., 129 F. 2d 914 (9th Cir. 1942); Combined Metals Reduction Co. v. U.S., 53 F. Supp. 739 (Utah 1943); Weeks v. Willingham, C.C.H., U.I. Serv., Fed,. par. 5054.505 (Ala. 1944).

[25] Employees: Bedford Pulp and Paper Co. v. Early (Pulp wood cutters, haulers, and loaders). Independent Contractors: Edens-Birch Lumber Co. v. Scofield, 58 F. Supp. 269 (N.D. Ohio 1944); Crossett Lumber Co. v. U.S., C.C.H., U.I. Serv., Fed., par. 9344 (Ark. 1948) (Logging contractors).

[26] Employees: Wholesale Oil Co. v. U.S., 154 F. 2d 745 (10th Cir. 1946); McIntire v. U.S., C.C.H., U.I. Serv., Fed., par. 5054.435 (Mo. 1948). Independent Contractors: Berkshire Oil Co. v. Rothensies, C.C.H., U.I. Serv., Fed., par. 5054.435 (Pa. 1945); Jenson v. Jones, C.C.H., U.I. Serv., Fed., par. 5054 (Okla. 1946).

[27] Employees: Tapager v. Birmingham, 75 F. Supp. 375 (N.D. Iowa 1948) (household furnishings); Beckwith, 67 F. Supp. 902 (Mass. 1946) (stationery); Stone v. U.S., 55 F. Supp. 230 (E.D. Pa. 1943) (securities); Hearst Publications, Inc. v. U.S., 168 F. 2d 751 (9th Cir. 1948) (newspaper vendors); Pure Baking Co. v. Early, C.C.H., U.I. Serv., Fed., par. 5054.659 (Va. 1943) (bakery goods); Danville Warehouse Co. v. U.S., C.C.H., U.I. Serv., Fed., par. 5079.591 (Va. 1940). Independent Contractors: Beaverdale Memorial Park, Inc. v. U.S., 47 F. Supp. 663 (Conn. 1942) (cemetery lots); Henry Broderick, Inc. v. Squire, 163 F. 2d 980 (9th Cir. 1947) (real esatte brokers); De-Raef Corp. v. U.S., 70 F. Supp. 264 (Ct. Cl. 1947) (sales agents of manufacturer of patented products); Cannon Valley Milling Co. v. U.S., 59 F. Supp. 785 (Minn. 1945) (so-called brokers selling flour and feed); Haley v. U.S., C.C.H., U.I. Serv., Fed., par. 5054.659 (Ind. 1944) (bakery goods).

A majority of the State unemployment insurance laws still contain, within the definition of "employment," the so-called 3-test provision.[28] At the time of this writing, there are 26 laws with the typical language.[29] Four States have two of the three tests.[30] Four other States have variations of the typical provision.[31] The remainder of the States have only the control test[32] or use a reference to services performed under a contract of hire[33] or within the master-servant relationship.[34]

The original 3-test provision was incorporated in the Wisconsin law in 1935,[35] even before the enactment of the Social Security Act.

[28] The typical language of the provision is as follows: "Services performed by an individual for wages shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the commissioner that (a) such individual has been and will cotninue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and (b) such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (c) such individual is customarily engaged in an independently established trade, occupation, profession, or business."

In addition to this provision, the definition of employment contains introductory language which usually states that "employment . . . means service . . . performed for wages or under any contract of hire, written or oral, express or implied . . ." An excellent discussion of the three tests will be found in 45 YALE L. J., pp. 86–88.

[29] Alaska, Delaware, Georgia, Hawaii, Illinois, Louisiana, Maine, Maryland, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, West Virginia, and Wyoming. The provision was eliminated from the North Carolina law at the current session of the North Carolina legislature by S. 155, L. 1949.

[30] Kansas has the first and second test, the first relating to freedom from control and the second requiring the service to be outside the regular course or all the places of the employer's business. Indiana, Oregon, and Wisconsin have the first and third tests, the third test relating to an independently established business.

[31] Oklahoma and Virginia have all three tests, but the second and third tests are connected by the disjuncitve rather than the conjunctive. According to the Virginia court, at least, this difference is immaterial. Life and Casualty Insurance Co. of Tennessee v. U.C.C., 181 Va. 811, 27 S.E. 2d 159 (1943). Arkansas and South Dakota have all three tests connected by the disjunctive, and the Arkansas definition includes an express reference to the master-servant relationship.

[32] Idaho, Iowa, Massachusetts, and Texas.

[33] California, District of Columbia, Kentucky, Michigan, and New York.

[34] Alabama, Colorado, Connecticut, Florida, Minnesota, and Mississippi. The Arizona, Colorado, and Florida laws refer to the service of an employee. The Connecticut provision is in terms of a contract for hire creating an employee relationship. The Minnesota law, in addition to the master-servant requirement, contains the third test relating to an independently established business. The Mississippi law contains the control test, in addition to the reference to the master-servant relationship.

This approach to the problem of who should come within the protection of measures such as the unemployment insurance laws was unique, and there is no doubt concerning the intent of the draftsmen who formulated this language. The coverage of the act was not to be limited to the technical legal relationship of master and servant.[36] The Wisconsin Supreme Court has pointed out, however, that the question is not what the framers or draftsmen meant but what the legislature intended by the language which they adopted.[37]

The majority view, despite the failure in many instances to recognize the source and purpose of the 3-test provision, still gives effect to the statutory language and, in the words of the courts at least, extends the coverage of the acts in question beyond the strict common-law definition of the master-servant relationship.[38]

---

[35] Wisconsin laws, 1935, c. 192, § 5.

[36] The background and the purpose of this provision is described at some length in Asia, *Employment Relation: Common-Law Concept and Legislative Definition*, 55 YALE L. J. 76, 83 (1945). The Wisconsin Advisory Committee, created by the State legislature, specifically advised that the three tests were "to be considered apart from conceptions of employer-employee relationships existing in other fields." The Committee on Legal Affairs of the Interstate Conference of Unemployment Compensation Agencies recommended in 1936 that a definition similar to that incorporated in the Wisconsin law should be included in other State laws "as the basis for extending their coverage beyond the master and servant realtionship." As one result of this recommendation, the so-called draft bill prepared by the Social Security Board's Bureau of Unemployment Compensation in January 1937 incorporated the three tests in their present form. There can scarcely be any doubt that this was the source of the provision contained in most of the State laws.

[37] Moorman Mfg. Co. v. Ind. Com., 241 Wis. 200, 5 N.W. 2d 743 (1942). It is an interesting problem to determine how the intention of the legislature can be different from that of the draftsmen of language which the legislature has adopted in the absence of any contrary explanation by the legislators themselves.

[38] That the majority of the state courts have given some effect to the special language of the three tests is carefully demonstrated in Asia, *Employment Relation: Common-Law Concept and Legislative Definition*, 55 YALE L. J. 76, 88 (1945). There has been no substantial change in the line-up of the states since that article was written. Rhode Island appears to have joined the minority view. Mt. Pleasant Cab Co. v. U.C.B., 53 A. 2d 485 (R.I. 1947). The Oklahoma court first ignored the three tests (in the majority opinion); Realty Mortgage and Sales Co. v. E.S.C., 197 Okla. 308, 169 P. 2d 761 (1945); and then appeared to give effect to the provision. Benner v. State, 201 P. 2d 236 (Okla. 1948). Both decisions concerned services rendered at a time when the Oklahoma law contained the standard definition. The Indiana court still adheres to the majority view. South Bend Fish Corp. v. E.S.D., 116 Ind. App. 348, 63 N.E. 2d 301 (1945); E.S.B. v. Motor Express, Inc., 117 Ind. App. 113, 69 N.E. 2d 602 (1946). In the latter case, the drivers were held to be independent contractors, but the appellate court reached this decision after applying the two tests contained in the Indiana law. The Washington court seems to be on the fence again as a result of a series of decisions concerning the status of real estate

There can be no doubt that the provision has been effective in particular cases, coverage having been determined thereunder where, on the facts, the outcome would have been extremely doubtful under the control test alone.[39]

Nevertheless, a critical examination of the cases in all the jurisdictions which have the 3-test provision reveals a lack of uniformity at least equal to that existing under the Federal precedents. Compare, for instance, the language of the North Carolina Supreme Court in *Jefferson Standard Life Insurance Co.* v. *U.C.C.*[40] where it was said: "As far as language will permit it, the act evinces a studied effort to sweep beyond and to include, by redefinition, many individuals who would have been otherwise excluded from the benefits of the act by the former concepts of master and servant and principal and agent as recognized at common-law," with the view

---

brokers and salesmen. Broderick, Inc. v. Riley, 22 Wash. 2d 760, 157 P. 2d 954 (1945); Curtis v. Riley, 22 Wash. 2d 743, 157 P. 2d 975 (1945); Coppage v. Riley, 24 Wash. 2d 968, 163 P. 2d 140 (1945). New Jersey remains with the majority. In Texas Co. v. U.C.C., 132 N.J.L. 362, 40 A. 2d 574 (1945), *aff'd* 134 N.J.L. 614, 48 A. 918 (1946), bulk distributors selling the oil company's products under a consignment agreement were held not to be within the statutory definition, but in a later case it was found that the members of a specialty act in burlesque came within its terms. Empire Theatre, Inc. v. U.C.C., 136 N.J.L. 254, 55 A. 2d 238 (1947), *aff'd* 137 N.J.L. 301, 59 A. 2d 623 (1948). Likewise Iillinois. A distributor of aluminum cooking utensils was able to satisfy all three tests ,and therefore was held exempt from coverage, in Aluminum Cooking Utensil Co. v. Gordon, 393 Ill. 542, 66 N.E. 2d 431 (1946); and in Donaldson v. Gordon, 397 Ill. 488, 74 N.E. 2d 816 (1947), involving a person licensed to sell floor coverings, it was held that the parties were not intended to be within the term "employment" as defined in the act, without specifically applying the three tests. In Concrete Materials Corp. v. Gordon, 395 Ill. 203, 69 N.E. 2d 841 (1946), however, individuals employed to address envelopes in their homes were found not to be engaged in an independently established trade or business and coverage was predicated upon the failure to meet this test. See, also, Attorney General Opinion dated September 23, 1948, ruling that individuals working as interviewers for a market research organization were engaged in employment despite their freedom from direction and control.

[39] See, for instance, Miller, Inc. v. Murphy, 379 Ill. 524, 42 N.E. 2d 78 (1942), and Photographic Illustrations, Inc. v. Murphy, 389 Ill. 334, 59 N.E. 2d 681 (1945), in which models were held to be within the definition of employment. The New York court, without the assistance of the statutory tests, has held that models are not employees. *In re* Barnaba Photographs Corp., 289 N.Y. 47, 43 N.E. 2d 720 (1942). Real estate salesmen have caused a great deal of difficulty in this field and the two leading cases which have held that they were engaged in employment placed reliance chiefly upon the independently established business test. Rahoutis v. U.C.C., 171 Ore. 93, 136 P. 2d 426 (1943); U.C. Div. v. Hunt, 22 Wash. 2d 897, 158 P. 2d 98 (1945). The loggers involved in Bonifas-Gorman Lumber Co. v. U.C.C., 313 Mich. 363, 21 N.W. 2d 163 (1946), were held to be independent contractors under the definition of "employment" after the removal of the three tests but were said to be clearly within the definition during the period when the three tests were still in effect.

[40] 215 N.C., 479, 2 S.E. 2d 584, 589 (1939).

of the Missouri court in *A. J. Meyer and Co.* v. *U.C.C.*,[41] that the three tests are the usual tests for determining whether the relation of independent contractor exists and that no change in the common-law meaning was intended.

In States which follow the Missouri view, of course, the three tests have been rendered ineffective for all practical purposes.[42] The mental gymnastics which the courts of several States have indulged in for the purpose of explaining prior inconsistent decisions merely highlight the general confusion.[43]

The experience of the Washington Supreme Court is classic. After starting out with a careful application of the three tests by Department 1 in *McDermott* v. *State*,[44] Department 2 of the same court evolved the *Washington Recorder* decision,[45] which became the bellwether of the courts adopting the minority view. In subsequent opinions, several of them by the entire court, the Washington jurists proceeded to repudiate, without actually overruling, the *Recorder* case.[46] In 1945, however, the pendulum swung back and the court, in the course of deciding that real estate brokers

---

[41] 348 Mo. 147, 152 S.W. 2d 184 (1941).

[42] The States which fall within this category, along with a full discussion of the cases which espouse the minority view, will be found in Asia, *Employment Relations: Common-Law Concept and Legislative Definition*, 55 YALE L. J. 76, 93 (1945). Ohio has joined this group by virtue of the opinion of the Supreme Court in Commercial Motor Freight, Inc. v. Ebright, 143 Ohio St. 127, 64 N.E. 297 (1944). The Ohio court has not only successfully nullified the provision but, like some of the other courts adhering to a similar interpretation, has determined that it operates to remove from the coverage of the act individuals who admittedly are employees under the strict common-law view. This "reverse English" apparently has borne fruit in the recent decision of the Court of Appeals on rehearing in American Life and Accident Insurance Co. of Kentucky v. Jones, C.C.H., U.I. Serv., Ohio, par. 8218 (1948). In its original opinion, the court had held that debit collectors working for a company selling industrial insurance were employees (C.C.H., U.I. Serv., Ohio, par. 8212), but on reconsideration the court changed its mind on the basis of the interpretation embodied in the Commercial Motor Freight opinion. The case is now pending, on appeal, in the Supreme Court.

[43] For instance, the explanation of the Wisconsin Bridge and Iron Co. decision in Moorman Mfg. Co. v. Ind. Com., 241 Wis. 200, 5 N.W. 2d 743 (1942); and the explanation of the Fuller Brush case in Singer Sewing Machine Co. v. Ind. Comm., 104 Utah 175, 134 P. 2d 479 (1942).

[44] 196 Wash. 261, 82 P. 2d 568 (1938).

[45] Washington Recorder Publishing Co. v. Ernst, 199 Wash. 176, 91 P. 2d 718 (1939).

[46] Matter of Far West Taxi Service, Inc., 9 Wash. 2d 134, 115 P. 2d 164 (1941); Maulhausen v. Bates, 9 Wash. 2d 264, 114 P. 2d 995 (1941); Matter of Foy, 10 Wash. 2d 317, 116 P. 2d 545 (1941); Sound Cities Gas & Oil Co. v. Ryan, 13 Wash. 2d 457, 125 P. 2d 246 (1942); State v. Goessman, 13 Wash. 2d 598, 126 P. 2d 201 (1942); Matter of Employees of Hillman Investment Co., 15 Wash. 2d 452, 131 P. 2d 160 (1942); U.C. Dep't v. Hunt, 17 Wash. 2d 228, 135 P. 2d 89 (1943); U.C. Dep't v. Hunt, 22 Wash. 2d 897, 158 P. 2d 98 (1945).

and salesmen working under a so-called joint adventure arrangement whereby the commissions were split, where not engaged in employment, indicated that the three tests were merely exceptions to the general definition of employment.[47] Thus the ghost of the *Washington Recorder* case was effectively resurrected.[48] Later the same year, the court, sitting en banc, cited the *Washington Recorder* case with obvious approval, along with most of the other cases adhering to the minority view.[49] In what appears to be the most recent case on the subject, however, the joint adventure arrangement met with much less sympathetic treatment than in the *Broderick* case, the court concluding that the crew members of a fishing vessel appeared much more like servants than joint contractors.[50]

In passing, it should be noted that other courts have been equally if not quite so spectacularly, uncertain.[51]

It is extremely interesting to note the variation in the decisions involving individuals similarly engaged. The differences in the treatment of salesmen and other distinct categories such as taxi and truck drivers, lumbermen, and similar borderline groups, should illustrate the difficulty of applying, with any degree of consistency and fairness, the tests which are presently in vogue, with or without a statutory definition.

In determining the proper weight to be given to this comparison, some allowance naturally must be made for differences in the facts as they were presented to the courts. A careful analysis of the fundamental relationship in most of these cases, however, will reveal that the factual differences are either artificial or concern details which, realistically speaking, have little or no bearing upon the basic issue. The terminology in a written contract, for instance,

---

[47] Broderick, Inc. v. Riley, 22 Wash. 2d 760, 157 P. 2d 954 (1945); Curtis v. Riley, 22 Wash. 2d 743, 157 P. 2d 975 (1945); Coppage v. Riley, 22 Wash. 2d 802, 157 P. 2d 977 (1945); *aff'd on rehearing*, 24 Wash. 2d 968, 163 P. 2d 140 (1945).

[48] See, dissenting opinions in Broderick, Inc. v. Riley, *supra;* also, the concurring opinion of Millard, J.

[49] Fraternal Order of Eagles v. Commissioner, 123 Wash. 158, 160 P. 2d 614 (1945) (coverage of members of an orchestra). The new approach was again applied in George J. Wolff Co. v. Riley, 24 Wash. 2d 62, 163 P. 2d 179 (1945), wherein the "lessees" of particular departments of a clothing and dry-good store were held not to be in "employment."

[50] Martin Skrivanich v. Davis, 29 Wash. 2d 150, 186 P. 2d 364 (1947) (decision by Dep't 2 of the Supreme Court.) The definition of employment had been amended in the meantime to provide that the introductory language should not be limited "by the relationship of master and servant as known to the common law or any other legal relationship." The effect which this amendment may have had is not clear since the court explains that this was the view which it had long since been following in any event, citing practically the whole line of decisions in between the *Washington Recorder* and the *Broderick* cases, *supra.*

may be reflected in varying degree or not at all in actual operations, the instrument having been drawn in many instances for the express purpose of avoiding the effects of this or other types of legislation, the operation itself proceeding without any fundamental change. The conditions upon which the continuance of a particular relationship depend are often understood by the parties themselves apart from any formal oral or written agreement, and, needless to say, these are extremely difficult to establish. Moreover, to the individuals involved, the differences in the details of an operation are likely to give little comfort when one receives the benefits of particular legislation and another performing essentially the same function must step aside upon the assurance that he is somehow a different breed altogether. Frequently the details which are stressed are merely the result of a process of selection, others of different import having been overlooked or assigned more or less arbitrarily to a minor role. If, in the solemn halls of legal legerdemain, these differences in factual detail actually do have such great significance, this is perhaps further proof that the yardstick leaves much to be desired.[52]

Truck drivers and driver-owners have been held to be within the definition of employment in Arizona, [53] Arkansas,[54] Georgia,[55]

[51] In Bert Baker, Inc. v. U.C.C., 301 Mich. 84, 3 N.W. 2d 20 (1942), the Michigan supreme court quoted the first of the three tests and ignored the second and third tests completely in deciding that workers in a "bump and paint" shop operated in connection with a used car business were not the employees of the owner of the shop. This oversight, however, was corrected. Acme Messenger Service Co. v. U.C.C., 306 Mich. 704, 11 N.W. 2d 196 (1943). The Utah supreme court misfired briefly in Fuller Brush Co. v. Ind. Comm., 99 Utah 175, 104 P. 2d 201 (1940), but followed the majority view in Singer Sewing Machine Co. v. Ind. Comm., 104 Utah 175, 134 P. 2d 479 (1943), and subsequent decisions. The Supreme Court of Illinois encountered difficulty and uncertainty in Ozark Minerals Co. v. Murphy, 384 Ill. 463, 51 N.E. 2d 197 (1943), but the court has consistently followed the earlier view since that time. Zelney v. Murphy, 387 Ill. 492, 56 N.E. 2d 754 (1944); Photographic Illustrations, Inc. v. Murphy, 389 Ill. 334, 59 N.E. 2d 681 (1945). The Arkansas supreme court, having adopted the majority view in McKinley v. R. L. Payne & Son Lumber Co., 200 Ark. 1114, 143 S.W. 2d 38 (1940), turned around, after the legislature amended the three tests by substituting the disjunctive for the conjunctive, and decided that the master-servant test was controlling even under the original language by virtue of the introductory language referring to services for wages. McCain v. Crossett Lumber Co., 206 Ark. 51, 174 S.W. 2d 114 (1943). The long and careful dissenting opinion of Robbins, J., in the latter case points out that there were no substantial differences between the operations of the timber cutters in the two cases.

[52] In two New York cases, where the details of the contract between the insurance company and its salesmen were undeniably different from those in the contracts employed by most other companies, protests nevertheless were registered, when the agents were found to be employees, on the ground that the agency had ruled that the salesmen of practically all the other companies carrying on identical operations were exempt as independent contractors. *In*

Illinois, [56] Michigan,[57] New York, [58] and Pennsylvania.[59] In Ohio,[60] and Minnnesota,[61] on the other hand, they fall without the scope

re Payne, 294 N.Y. 894 (memo, 1945); *In re* Goldstein, 294 N.Y. 893 (memo. 1945). In this connection, the testimony of representatives of several organizations of commission salesmen before the House Ways and Means Committee on Friday, April 8, in connection with H.R. 2893, is quite interesting. Together, they apparently represented about 15,000 wholesale commission salesmen, and one of their main points was that coverage under the present language of Title II of the Social Security Act is determined in large measure by employer attitudes. They estimated that about one-half of their members were receiving wage credits while the other half, with similar duties and the same fundamental relationship, were not. It is quite significant that these speakers felt that appeal to the Social Security Administration was not a practical solution to the problem since such appeals would frequently jeopardize the workers' jobs. They urged either the "economic reality test" as a basis for determining employee status, or, in the alternative, a definition of "employee" which would specifically include commission salesmen. The slim thread by which many of these decisions hang is illustrated in the case of Singer Sewing Machine Co. v. Ind. Com., 104 Utah 175, 134 P. 2d 479 (1943), in which the court gave controlling weight to, and the concurring opinion relied entirely upon, a provision of the contract requiring the salesmen "to do any act that the company may consider necessary or advisable for the protection of its interests and the enforcement of its rights under any sale or lease effected by the second party or with respect to any account entrusted to the second party for collection." Apparently the simple act of deleting this particular clause, which could hardly be considered essential to the relationship, would change the complexion of this particular relationship completely.

[53] Sisk v. Arizona Ice & Cold Storage Co., 60 Ariz. 496, 141 P. 2d 395 (1943). The difference between what the ice truck drivers (called "retail dealers") paid for ice and the price they charged customers was said to be wages for services rendered, and it was held that the three tests then contained in the Arizona law did not remove these services from the definition.

[54] Ice Service Co. v. Goss, 212 S.W. 2d 933 (Ark. 1948). The company involved was engaged in the distribution of ice at wholesale and retail. Some of its drivers owned their own trucks and the agency did not claim that these men were employees. Others used a horse and wagon furnished by the company and, in consideration thereof, paid five cents more per hundred pounds for the ice which they obtained from the company and resold along their routes. The court found that the drivers of the latter type came within the definition of "employment," which, at the time of the case, had the three tests connected by the disjunctive.

[55] Brewster v. Huiet, 69 Ga. App. 593, 26 S.E. 2d 198 (1943). These were laundry truck drivers who owned their own trucks and collected and delivered laundry. One of the drivers owned a dry cleaning business and all of them were said to be free to solicit customers anywhere they liked and to take the laundry wherever they pleased. The contract in this case was carefully drawn to avoid any semblance of control and the laundry tickets indicated that the work was done for the particular driver by the laundry in question. In setting up the arrangement, the name of the company was taken off all of the trucks, and the company insisted that each driver have his own name placed thereon or the company would paint it on for them. Despite all of these precautions, the court found some evidence of control.

[56] Rozran v. Durkin, 381 Ill. 97, 45 N.E. 2d 180 (1942) (a delivery man who operated his own truck for a messenger service); Zelney v. Murphy, 387

of the act. Indiana has decisions that go both ways.[62] New York, it will be noted, has taken the affirmative side without the benefit of the three tests and Ohio, with them, has adopted the negative.[63] Arkansas says yes and Minnesota says no with modified versions of the three tests which are quite similar.[64]

Ill. 492, 56 N.E. 2d 754 (1944) (motorcycle owners who worked for a delivery service); Lawndale Wholesale Grocery Co. v. Gordon, C.C.H., U.I. Serv., Ill., par. 1330.079 (Cir. Ct. 1945) (drivers who owned their own trucks); Monarch Hardwood Lumber Co., Inc. v. People, C.C.H., U.I. Serv., Ill., par. 82.04 (Super. Ct. 1946) (drivers who owned their own trucks and did hauling for others only 5 per cent of the time); Overland Produce Co., v. Murphy, C.C.H., U.I. Serv., Ill., par. 1330.031 (Cir. Ct. 1944) (truck owners working for delivery service).

[57] Acme Messenger Service Co. v. U.C.C., 306 Mich. 704, 11 N.W. 2d 296 (1943) (delivery boys who furnished their own bike, car or truck while working for a company in the delivery business).

[58] *In re* Gailey Coal Co., 263 App. Div. 1023, 33 N.Y.S. 2d 511 (1942) (where the company had a contract with the union which referred to the owner-drivers as employees).

[59] Pennsylvania v. McNeely, C.C.H., U.I. Serv., Pa., par. 1330.41 (C.P. 1944) (owner-operators of school busses).

[60] Commercial Motor Freight, Inc. v. Ebright, 143 Ohio St. 127, 54 N.E. 2d 297 (1944) (drivers furnished their own tractors and the company supplied the trailers).

[61] Rochester Dairy Co. v. Christgau, 217 Minn. 460, 14 N.W. 2d 780 (1944) (milk haulers who owned their own equipment and picked up milk from farmers in the surrounding area and returned the empty cans). The court relied principally upon the workmen's compensation case of Moore v. Kileen and Gillis, 171 Minn. 15, 213 N.W. 49 (1927), where the truck owner made occasional hauls of miscellaneous merchandise. At the time of the Rochester Dairy case, the Minnesota law contained the three tests but also was limited by the express requirement that the relationship of master and servant must exist.

[62] In South Bend Fish Corp. v. E.S.D., 116 Ind. App. 348, 63 N.E. 2d 301 (1945) route drivers to whom the company furnished refrigerator trucks were held to be within the definition of employment. In E.S.B. v. Motor Express, Inc., 117 Ind. App. 113, 69 N.E. 2d 603 (1946), on the other hand, owner-drivers who used their trucks to haul for others as well as for the trucking service, and who hired their own employees, were held not to be engaged in employment. See Bates Motor Transport Lines, Inc. v. Mayer, 213 Ind. 664, 14 N.E. 2d 91 (1938). (Personal injury action in which owner-drivers were held to be employees where they transported freight exclusively for the motor carrier corporation and were, according to the court, subject to the corporation's direction and control.)

[63] Situations like this, many more of which will be noted in the subsequent paragraphs, demonstrate the accuracy of the following observation in Asia, *Employment Relation: Common-Law Concept and Legislative Definition*, 55 YALE L. J. 76, 11 (1945): "It is particularly notable that the attitude of the Connecticut and New York courts, although they were interpreting a statute without definitional aids other than a declaration of policy, seems to have been more effective in achieving results compatible with the purposes of the legislation than the 'A B C' definition, with all its specificity of criteria, in the hands of less sympathetic courts."

[64] In view of the number of cases in which ownership of the trucks used in

The drivers of small trucks engaged in the distribution of bakery goods, most of whom owned their own trucks, have been held to be within the definition of employment with the benefit of the three tests in two instances[65] and without them in two others.[66]

Taxi drivers have fared quite well under the unemployment compensation laws, in contrast with their experience in some of the Federal courts. In Rhode Island, despite the 3-test provision, drivers using cabs under a lease arrangement were held to be independent contractors and not within the definition of employment.[67] In at least four other States, however, two of them without the 3-test provision, the drivers were held to be in employment.[68]

---

the hauling operations did not prevent a finding that the driver was engaged in employment, this difference in the facts does not necessarily explain the opposite results, notwithstanding the fact that the Arkansas agency made no issue with respect to the owner-drivers involved in the ice company case.

[65] Bender v. Murphy, C.C.H., U.I. Serv., Ill., par. 1390.11 (Cir. Ct. 1942)—in which owner-drivers obtained bakery goods at a 30 per cent discount and peddled them house to house, being required to wear uniforms, attend sales meetings and sell the goods at fixed prices; Hauswirth v. Bd. of Review, 69 Ohio App. 79, 43 N.E. 2d 240 (1941) (in which the court said that the salesmen of baked goods must work diligently while their products are fresh and therefore could not be masters of their own time and efforts). In the latter case, the court made no reference to the three tests.

[66] Borck and Stevens, Inc. v. Danaher, C.C.H., U.I. Serv., Conn., par. 1330.03 (Super. Ct. 1941) (in which the contract gave the bakery the right to discharge the driver and contained a restrictive covenant prohibiting him from engaging in a similar business for one year after the termination thereof; *In re* Castaldo, 263 App. Div. 758, 30 N.Y.S. 2d 736 (1941); *In re* Perdziak, 19 N.Y.S. 2d 1000 (1940). In the latter case, the bakery sold the distributor a truck for delivering cookies, but the truck carried the company's name and the so-called distributor was assigned an established route and had fixed hours.

[67] Mt. Pleasant Cab Co. v. U.C.B., 53 A. 2d 485 (R.I. 1947). The drivers in this case were admittedly employees until April 1, 1944, at which time the lease arrangement was instituted.

[68] In Kaus v. U.C.C., 230 Iowa 860, 299 N.W. 415 (1941), the company used the rental device but the court said it could scarcely be claimed that the drivers were in business for themselves and pointed out that at least so far as the public was concerned they lost their identity as drivers for the cab company. The Iowa law contains only the control test. In Radley v. Commonwealth, 297 Ky. 830, 181 S.W. 2d 417 (1944), also a rental arrangement, the company procured the license to operate the cabs and, according to the court, retained control over the drivers. In one Washington case, the drivers were hired and paid a weekly wage at the rate of $5 a day, the court finding that they were the employees of the corporation which operated the cab business rather than the cab owners who rented their vehicles to the drivers. *In re* Far West Taxi Service, 9 Wash. 2d 134, 115 P. 2d 164 (1941). In another case, the driver agreed to buy the cab from the taxi company under a conditional sales contract, but the court found control. U.C.D. v. Yellow Cab Co., C.C.H., U.I. Serv., Wash., par. 1330.13 (Super. Ct. 1944). The drivers in Michigan Cab Co. v. U.C.C., C.C.H, UI Serv, Mich, par. 1330.85 (Cir. Ct. 1942), were held to come within the definition of employment which, at the time of the case, contained the three tests. In this connection, it is also

Men engaged in logging operations have been held to be in employment in Arizona,[69] New York,[70] Virginia,[71] Washington,[72] and West Virginia.[73] In Michigan, they were held not to be employees after the removal of the three tests from the definition,[74] and in Arkansas the court found that they were, in a case before the three tests were amended,[75] and were not after the amendment.[76]

---

interesting to note the number of cases in which cab companies were held liable to third parties in personal injury cases despite the existence of rental agreements. Meridian Taxicab Co. v. Ward, 184 Miss. 449, 186 So. 636 (1939); Richmond v. Clinton, 144 Kan. 328, 58 P. 2d 1116 (1936); Fitzgerald v. Cardwell, 207 Mo. App. 514, 226 S.W. 971 (1921); Lassen v. Stanford Transit Co., 102 Conn. 76, 128 Atl. 117 (1925). In the latter case, the driver used and maintained his own cab and was paid by commission.

[69] Arizona Lumber and Timber Co. v. E.S.C., C.C.H., U.I. Serv., Ariz., par. 8101 (Super. Ct. 1944). The men in this case were engaged in cutting and hauling timber, which the court pointed out was an essential step in the usual course of the company's business. Also, it was found that the company exercised control over the cutters and the court mentioned the fact that the cutters had no license of their own.

[70] *In re* Rowe, 263 App. Div. 915, 32 N.Y.S. 2d 170 (1942). In this case, the company had engaged a man to cut, peel, and draw timber to the mill. The court stressed the fact that the actual operations did not adhere to the letter of the contract.

[71] U.C.C. v. Collins, 182 Va. 426, 29 S.E. 2d 388 (1944). The owner of the timber allegedly leased or sold his saw mill to the operators involved, but the court found that the purchase contract was never actually carried out. Assuming no control, the court found that none of the remaining alternative tests in the Virginia definition had been set, pointing out that the owner was in the timber and saw mill business.

[72] Sundown Logging Company v. Bates, C.C.H., U.I. Serv., Wash., par. 1330.07 (Super. Ct. 1940). In this case, the men were engaged to fall and buck timber. Their tools were supplied by the company and they worked on a piece-work basis.

[73] Raynes v. Bd. of Review, C.C.H., U.I. Serv., W. Va., par. 1330.01 (Cir. Ct. 1941). The saw mill operator in this case worked on the land of the coal company and cut logs for others on only one occasion. The court found control by the coal company and failed to mention the other two tests.

[74] Bonifas-Gorman Lumber Co. v. U.C.C., 313 Mich. 363, 21 N.W. 2d 163 (1946). The workers in this case were engaged in cutting saw logs from standing timber and cutting, manufacturing, and pliing pulp wood and cedar tie-cuts on a piece-work basis. They furnished their own tools and hired their own help if needed. The company had each man sign an elaborate contract which was quoted at length in the court's opinion. The case arose when some of the so-called jobbers filed claims for unemployment compensation benefits after losing their jobs. Not only had the three tests been repealed, but the Michigan act contained a specific exclusion provision (sec. 42 (7) (m)) applying to service performed in logging or woods operations, compensated wholly on a piece-work or quantity basis, unless such service was included as employment under Title 9 of the Social Security Act. As already pointed out (note 39, supra), the court also held that these men came within the definition of employment prior to the removal of the three tests.

[75] McKinley v. R. L. Payne & Son Lumber Co., 200 Ark. 1114, 143 S.W. 2d 38 (1940). The worker in this case was an uneducated laborer engaged in

The lease device was tried in the barber and beauty shop business but with small success, with some credit in this instance apparently due the 3-test provision.[77] Lease arrangements in other types of cases have met with varying success. So-called lessees of amusement vending machines,[78] of a theater,[79] a retail grocery,[80] and of a space in a mine[81] were found to be in employment; also

---

stacking lumber, and the court referred to him as a mere employee but held that his status under the common-law test was immaterial in view of the three statutory tests contained in the Arkansas law at the time the case arose.

[76] McCain v. Crossett Lumber Co., 206 Ark. 51, 174 S.W. 2d 114 (1943); Southern Kraft Corp. v. McCain, 205 Ark. 963, 171 S.W. 2d 947 (1943); Crossett Lumber Co. v. McCain, 205 Ark. 631, 170 S.W. 2d 64 (1943). In the latter case, the timber cutters were employed by a company operating a saw mill, pulp mill, and chemical plant. Workers equivalent to foremen furnished equipment for the cutting operations and selected the cutters. Both types of workers filed claims for benefits when the company's mills were shut down by a strike. In the Southern Kraft Corp. case, the cutters were engaged by a paper mill to cut timber on the mill's own property, each crew being in charge of an individual referred to as a "producer." In both cases, the court relied heavily upon the modification of the 3-test provision, which changed it from the conjunctive to the disjunctive and added specific language referring to the legal relationship of master and servant.

[77] Two Washington cases involved barbers, which were held to be within the definition of employment. McDermott v. State, 196 Wash. 261, 82 P. 2d 568 (1938); State v. Goessman, 13 Wash. 2d 598, 126 P. 2d 201 (1942). Barbers in two other states having the 3-test provision fared equally well. Young v. B.U.C., 63 Ga. App. 130, 10 S.E. 2d 412 (1940); Tharp v. U.C.C., 57 Wyo. 486, 121 P. 2d 172 (1942). Operators in a beauty shop were found to be in employment in U.C.C. v. Harvey, 179 Va. 202, 18 S.E. 2d 390 (1942), and in State v. Iden, 71 Ohio App. 65, 47 N.E. 2d 907 (1942). *In re* Scolamerio, 262 App. Div. 1053 (1941), the New York court upheld the coverage of beauticians who leased their booths, but apparently considered the barber shop in an adjoining room as a separate venture, the barber, who was the brother-in-law of the owner and who had purchased the business and leased the room at a flat monthly rental, being held to be an independent contractor. Bootblacks and manicurists working in barber shops have been held to be in employment in the McDermott case, supra, and in Keltner v. Murphy, C.C.H., U.I. Serv., Ill., par. 8270 (Cir. Ct. 1948). In the latter case, the boolblack also acted as porter and the manicurist sometimes acted as cashier for the shop. In two states without the three tests, however, these individuals have been considered independent contractors. Marzano v. Danaher, 9 Conn. Supp. 71 (1941); Opinion of Attorney General (Ala. Sept. 28, 1937), C.C.H., U.I. Serv., Ala., par. 1330.03.

[78] Tomlin v. Employment Comm., 30 Cal. 2d 118, 180 P. 2d 342 (1947).

[79] Johnson v. Huiet, 67 Ga. App. 638, 21 S.E. 2d 437 (1942). In this case, no rent was actually paid under the alleged lease, and the court found that the individuals involved actually were employees of the owner.

[80] Emile Bastian & Co. v. Murphy, C.C.H., U.I. Serv., Ill., par. 1330.054 (1943). The court held that service could be performed in connection with a lease, and the so-called lessees of a retail store owned by wholesale grocery company were found to be under the company's control and had no independent business of their own.

[81] Combined Metals Reduction Co. v. Ind. Comm., 101 Utah 230, 116 P. 2d

a dentist[82] and a tailor[83] engaged under lease arrangements. On the other hand, the device was successfully used in connection with garage mechanics,[84] operators of automatic phonograph machines,[85] particular departments of a department store,[86] and miners operating a California mine.[87]

Contrary to the view of at least one Federal court,[88] the State courts have found that free lance jockeys were engaged in employment;[89] and a similar view has been adopted with respect to pin-setters in bowling alleys[90] and applicators of roofing and siding materials.[91] One of the decisions in the case of both the jockeys and the pin-setters was without benefit of the 3-test provision. Entertainers, on the other hand, have received contradictory treatment. Vaudeville artists were considered to be independent contractors, with or without the help of the three tests,[92] whereas a specialty act in burlesque[93] and a radio actor[94] were held to be within the definition.

---

929 (1941); National Tunnel and Mines Co. v. Ind. Comm., 99 Utah 39, 102 P. 2d 508 (1940).

[82] Appelgate v. U.C.C., C.C.H., U.I. Serv., Mich., par. 1330.228 (1941).

[83] Brenner v. State, 201 P. 2d 263 (Okla. 1948).

[84] Bert-Baker, Inc. v. U.C.C., 301 Mich. 84, 3 N.W. 2d 20 (1942); E.S.C. v. Lund, C.C.H., U.I. Serv., Calif., par. 1330.228 (1946).

[85] Gable Mf'g Co. v. Murphy, 390 Ill. 455, 62 N.E. 2d 401 (1945). In this case, the court remarked that the definition in the act did not destroy the relation of contractor or subcontractor and that the principal consideration in determining what relationship existed was the right of control. In connection with the confusion discussed earlier in this article, this kind of a statement is hardly consistent with other opinions by the same court and with a full recognition of the application of the 3-test provision. On the face of the statute, no one of the tests is entitled to more weight than the others.

[86] George J. Wolff Co. v. Riley, 24 Wash. 2d 62, 163 P. 2d 179 (1945); Commonwealth v. Kaufman Straus Co., 300 Ky. 1, 187 S.W. 2d 821 (1945).

[87] Empire Star Mines Co., v. Employment Comm., 28 Cal. 2d 33, 168 P. 2d 686 (1946).

[88] Whalen v. Harrison, 51 F. Supp. 515 (N.D. Ill. 1943).

[89] Isenberg v. E.S.C., 30 Cal. 2d 34, 180 P. 2d 11 (1947); Denemark v. Murphy, C.C.H., U.I. Serv., Ill., par. 1330.050 (1943).

[90] Rogers v. Danaher, C.C.H., U.I. Serv., Conn., par 1330.117 (1940); State v. Wertz, C.C.H., U.I., Serv., Pa., par. 1330.02 (1943).

[91] O'Brian v. U.C.C., 309 Mich. 18, 14 N.W. 2d 560 (1944). This case was decided under the 3-test provision. The contract for each job was between the company and the property owner. The company furnished all materials and the applicator was engaged to install them on the building, employing and paying his own helpers for each job. The contract, however, required performance in accordance with the company's instructions.

[92] *In re* Lansdowne Service Corp., 263 App. Div. 916, 32 N.Y.S. 2d 175 (1942); *In re* Radio City Music Hall Corp., 262 App. Div. 593 (N. Y. 1941); *In re* Post Theatre Co., C.C.H., U.I. Serv., Wash., par. 1330.135 (1945).

[93] Empire Theatre, Inc. v. U.C.C., 136 N.J.L. 254, 55 A. 2d 238 (1947), *aff'd* 137 N.J.L. 301, 59 A. 2d 623 (1948).

[94] *In re* Velie, 267 App. Div. 1022, 48 N.Y.S. 2d 61 (1944), *aff'd* 294 N.Y.

Salesmen get the most inconsistent treatment of all.

Security salesmen fall within the pale in practically all of the cases,[95] although one State has decisions on both sides of the question.[96] Real Estate salesmen, on the other hand, have been responsible for no end of difficulty. Illinois,[97] with the standard 3-test provision, and Oregon,[98] with two of the three tests, have been the only States to hold consistently that they are within the definition of employment. Washington originally decided that real estate agents were engaged in employment[99] but subsequently found that they fell outside of the definition.[100] Other States have found all kinds of reasons for classing them as independent contractors, more of them with the 3-test provision than without.[101]

725, 61 N.E. 2d 455 (1945). The actor in this case was held to be in the employ of the Ted Collins Corp., the producer of a radio show for a nationally-known sponsor.

[95] Robert C. Buell & Co. v. Danaher, 127 Conn. 606, 18 A. 2d 697 (1941) (in which, without the benefit of the 3-test provision, the court stressed the fact that the company furnished office space and facilities as well as information, kept the customers' accounts, and sent out bills, control being found from the assumed need of operating the business efficiently); Ames, Emrich & Co. v. Durkin, C.C.H., U.I. Serv., Ill., par. 1390.02 (1940) (dealer financed sales, assumed risk, and furnished desk and telephone); Public Finance Service, Inc. v. B.E.U.C., 56 Dauph. 4 (Pa. 1944) (wherein the individuals involved were registered as agents or salesmen for the dealer in question with the Pennsylvania Securities Commission); Northern Oil Co. v. Ind. Com., 104 Utah 353, 140 P. 2d 329 (1943); Sound Cities Gas and Oil Co. v. Ryan, 13 Wash. 2d 457, 125 P. 2d 246 (1942).

[96] *In re* Dunne, 293 N.Y. 780 (memo. 1944), bond salesmen for a dealer who furnished desk space, stenographer service, and telephone were held to be employees, whereas the salesmen of collateral trust bonds *in re* Fidel Assoc. of N.Y., Inc., 287 N.Y. 626 (memo. 1941) were held to be independent contractors apparently because, according to the factual statement, they were free to select their own customers and the time and manner of solicitation, and some of them did their selling "on the side."

[97] Jacob v. Director of Labor, C.C.H., U.I. Serv., Ill., par. 1390.133 (1945); John Krohn v. Murphy, C.C.H., U.I. Serv., Ill., par. 1390.131 (1944); McClun v. Murphy, C.C.H., U.I. Serv., Ill., par. 1390.13 (1943); Bon Aire Builders, Inc. v. Murphy, C.C.H., U.I. Serv., Ill., par. 1390.138 (1943).

[98] Rahoutis v. U.C.C., 171 Ore. 93, 136 P. 2d 426 (1943).

[99] U. C. Dept. v. Hunt, 17 Wash. 2d 228, 135 P. 2d 89 (1943); U.C. Div. v. Hunt, 22 Wash. 2d 897, 158 P. 2d 98 (1945).

[100] Broderick, Inc. v. Riley, 22 Wash. 2d 760, 157 P. 2d 954 (1945); Curtis v. Riley, 22 Wash. 2d 743, 157 P. 2d 975 (1945); Coppage v. Riley, 24 Wash. 2d 968, 163 P. 2d 140 (1945). The effect of these cases has already been discussed.

[101] E.S.C. v. Morris, 28 Calif, 2d 812, 172 P. 2d 497 (1946); A. J. Meyer & Co. v. U.C.C., 348 Mo. 147, 152 S.W. 2d 184 (1941); *In re* Wilson Sullivan Co. 289 N.Y. 110, 44 N.E. 2d 387 (1942); Realty Mtg. & Sales Co. v. E.S.C., 197 Okla. 308, 169 P. 2d 761 (1945); Sears-McCullough Mtg. Co. v. E.S.C., 197 Okla. 458, 172 P. 2d 613 (1946); Pointer v. Murphy, C.C.H., U.I. Serv., Okla. par. 1390.04 (1940); Guarantee Mtg. Co. v. Bryant, 179 Tenn. 579, 168 S.W. 2d 182 (1943).

Sewing machine salesmen qualify;[102] but the Fuller Brush man, of all people, is the source of considerable controversy.[103] Vacuum cleaner salesmen are considered to fall within the definition in three States,[104] against one which considers them too independent.[105]

Distributors of petroleum products represent another field where there is a sharp difference of opinion, the majority of the courts having held that the distributors were independent contractors who did not fall within the definition of employment. Oddly enough, the only case of last resort which has determined that these distributors were engaged in employment as defined in the unem-

[102] Singer Sewing Machine Co. v. U.C.C., 167 Ore. 142, 116 P. 2d 744 (1941); Singer Sewing Machine Co. v. Ind. Com., 104 Utah 175, 134 P. 2d 479 (1943).

[103] The New Jersey Court, in Schomp v. Fuller Brush Co., 124 N.J.L. 487, 12 A. 2d 702 (1940), *aff'd* 126 N.J.L. 368, 19 A. 2d 780 (1941), decided that an agreement engaging individuals to sell a company's products on a commission basis in territory fixed by the company, with a minimum sales requirement, failed to put such salesmen into an independently established business. The Utah court, on the other hand, in Fuller Brush Co. v. Ind. Com., 99 Utah 97, 104 P. 2d 201 (1940), looked upon the agreement as a contract for the sale of goods to local dealers for cash, so that no personal services for wages were rendered. Both laws contain the standard 3-test provision. A Connecticut court, without the three tests, has followed the Utah view. Fuller Brush Co. v. Egan, C.C.H., U.I. Serv., Conn., Par. 8161 (Super. Ct. 1946). The operations of the Fuller Brush Co. are well known and most housewives in cities of any size are acquainted with the Fuller Brush man. He is, as they say, the low man on the totem pole, the company maintaining an elaborate organization for the selling of their brushes and other products directly to the consumer. As the Connecticut court has carefully explained, the entire country is marked off into nine divisions, which are broken down into branches, sections, and blocks, each one coming under the supervision of a company manager. The block managers engage, and are directly in contact with, the salesmen or so-called "dealers." The court frankly states that the 6,000 "dealers" in Connecticut were an important part of the company's selling organization. Nevertheless, it was greatly impressed by the fact that the company's sales manual contained only recommendations, that incentives rather than sales quotas were utilized, that the company did not fix the price of its articles and that attendance at sales meetings was optional. The court mentioned the fact that buttons "authenticating" the salesman's connection with the company were furnished but were not required to be worn.

[104] Murphy v. Daumit, 387 Ill. 406, 56 N.E. 2d 800 (1944); Electrolux Corp. v. Bd. of Review, 129 N.J.L. 154, 28 A. 2d 207 (1942); *In re* Electrilux Corp., 288 N.Y. 440, 43 N.E. 2d 480 (1942). The New York court, of course, arrived at this conclusion without the help of the three tests, but it pointed out realistically that the company's "suggestions" were enforceable because of its right to terminate the contract on short notice.

[105] Electrolux Corp. v. Danaher, 128 Conn. 342, 23 A. 2d 125 (1941). The court's description of the company's sales organization sounds very much like the Fuller Brush setup. Sales representatives were obtained by ads in the paper and were signed up "if they wished to go into the business of selling cleaners." Prices were fixed by the company, standard order blanks were used, contests were conducted, suggestions were printed and furnished to the "dealers," and pep meetings and clinics were frequently held.

ployment insurance act, did so without the benefit of the 3-test provision.[106] The Idaho law contains only the control test, but the Supreme Court ruled that the determination thereunder was not limited to established common-law rules. Three States with the standard 3-test provision have reached a contrary conclusion[107] and two others, without a specific definition, agree.[108]

Insurance salesmen as a group again illustrate the difficulty of reaching a conclusion with any degree of certainty in borderline cases. The problem in this instance is complicated somewhat by the special exclusions which have appeared in a great many of the State laws.[109] Most of the courts in this instance, however, have

[106] Continental Oil Co. v. U.C.D., 192 P. 2d 599 (Idaho, 1947), *aff'd on rehearing*, C.C.H., U.I. Serv., Idaho, par. 8171 (1948). The court did not consider the Federal Internal Revenue rulings to be controlling under the circumstances and called attention to the fact that the company owned the bulk stations and the products stored therein, that the operator was limited to the company's petroleum products and was held to a strict accounting, the contract being terminable without notice. The court concluded that the company retained the right of control in every substantial particular. A filling station operator has been held to be in employment where the oil company directed his activities in general, paid the mercantile tax, and fixed the price of the products. Commonwealth v. Marie Gas & Oil Co., C.C.H., U.I. Serv., Pa., par. 1390.11 (1944).

[107] Texas Co. v. U.C.C., 132 N.J.L. 362, 40 A. 2d 574 (1945), *aff'd*, 134 N.J.L. 614, 48 A. 2d 918 (1946); Texas Co. v. Bryant, 178 Tenn. 1, 152 S.W. 2d 627 (1941); Ind. Com. v. Orange State Oil Co., 155 Fla. 772, 21 So. 2d 599 (1945). The contracts in these instances were referred to as consignment agreements and the court in each instance felt that the three tests were inapplicable because the contracts were not for personal service. In Arrow Petroleum Co. v. Murphy, 389 Ill. 43, 58 N.E. 2d 532 (1944), the Supreme Court of Illinois carefully distinguished between the major operators and the small solicitors who took orders for the oil company, the latter being held in employment.

[108] Barnes v. Indian Refining Co., 280 Ky. 811, 134 S.W. 2d 620 (1939); American Oil Co. v. Wheeless, 185 Miss. 521, 187 So. 889 (1939); Texas Co. v. Wheeless, 185 Miss. 799, 187 So. 880 (1939). In the last two cases restrictive covenants were contained in the contracts, but the court gave no particular notice to them. Campare Gulf Refining Co. v. Nations, 167 Miss. 315, 145 So. 327 (1933), where the "distributor" had no money invested in the plant, was subject to orders, and was held to be an employee; Texas Co. v. Mills, 171 Miss. 231, 156 So. 866 (1934), in which a "commission agent" was held to be an employee, although he owned the truck and hired his assistants, where he was required to observe the company's instructions; and Texas Co. v. Jackson, 174 Miss. 737, 165 So. 546 (1936), where the "distributor" was held to be an employee even though he owned the bulk plant itself, furnished his own trucks, and hired his own assistants.

[109] The insurance agent exclusion in the Colorado law was inserted within a few months after the state supreme court's decision in Ind. Com. v. Northwestern Mutual Life Insurance Co., 103 Colo. 550, 88 P. 2d 560 (1939). Some of the decisions in the industrial insurance cases were rendered in States which had an express exclusion relating to agents working entirely on a commission basis, the result hinging on the fact that so-called debit collectors usually

concluded that this type of salesman falls within the definition.[110] Once again, no line can be drawn on the basis of the presence or absence of the 3-test provision, the decisions on both sides of the question falling almost equally into the two categories. Agents in the industrial insurance field present a slightly different factual picture. Here too the authorities are divided, but a decisive majority hold them to be in employment.[111]

---

receive a basic wage or minimum weekly advance. Many of the insurance agent cases were decided before express exemptions were included.

[110] In employment: Patrick and Breit v. E.S.C., C.C.H., U.I. Serv., Calif., par. 1395.06 (1945); Industrial Com. v. Northwestern Mutual Life Insurance Co., 103 Colo., 550, 88 P. 2d 560 (1939); Equitable Life Insurance Co. of Iowa v. Industrial Com., 105 Colo. 144, 95 P. 2d 4 (1939); Brannaman v. International Service Union Association, 108 Colo. 409, 118 P. 2d 457 (1941); N.Y. Life Insurance Co. v. Murphy, 388 Ill. 316, 58 N.E. 2d 182 (1944); North American Insurance Co. v. U.C.C., 12 So. 2d 925 (Miss. 1943); *In re* Payn, 294 N.Y. 894 (memo. 1945); *In re* Goldstein, 294 N.Y. 893 (memo. 1945); U.C.C. v. National Life Insurance Co., 219 N.C. 576, 14 S.E. 2d 689 (1941); Jefferson Standard Life Insurance Co. v. U.C.C., 215 N.C. 479, 2 S.E. 2d 584 (1939).

Not in employment: Northwestern Musual Life Insurance Co. v. Tone, 125 Conn. 183, 4 A. 2d 640 (1939); Industrial Com. v. Peninsular Life Insurance Co., 152 Fla. 55, 10 So. 2d 793 (1942); *In re* Murphy, 265 App. Div. 984 (N.Y., 1942); Northwestern Mutual Life Insurance Co. v. Atkinson, C.C.H., U.I. Serv., Ohio, par. 139.01 (1940).

In Garrison v. E.S.C., 64 Calif. App. 2d 820, 149 P. 2d 711 (1944), the agent maintained his own office, sold different types of insurance and represented several different companies. The court stated that ordinary insurance agents and debit collectors were employees, but that this particular agent was clearly in an independently established business. Accord: *In re* Waroshill, 263 App. Div. 546, 33 N.Y.S. 2d 712 (1942).

[111] In employment: Washington National Insurance Co. v. E.S.C., 61 Ariz. 112, 144 P. 2d 688 (1944); Review Board v. Mammoth Life & Accident Insurance Co., 111 Ind. 2d 660, 42 N.E. 2d 379 (1942); Home Beneficial Life Insurance Co. v. Davis, C.C.H., U.I. Serv., Md., par. 1395.01 (1933); Washington National Insurance Co. v. Bd. of Review, 137 N.J.L. 596, 61 A. 2d 178 (1948); Superior Life, Health & Accident Insurance Co. v. Bd. of Review, 127 N.J.L. 537, 23 A. 2d 806 (1942); *In re* Appelate, 265 App. Div. 899 (N.Y. 1942); Home Beneficial Insurance Co. v. U.C.C., 181 Va. 811, 27 S.E. 2d 159 (1943); Life & Casualty Insurance Co. of Tennessee v. U.C.C., 178 Va. 46, 16 S.E. 2d 357 (1941); Superior Life, Health & Accident Insurance Co. v. Bd. of Review, 148 Pa. Super. 307, 25 A. 2d 88 (1942).

Not in employment: Huiet v. Atlanta Life Insurance Co., C.C.H., U.I. Serv., Ga., par. 1395 (Super. Ct. 1942) (debit collector classed as insurance agent on commission and held within express exemption); U.C.C. v. Union Life Insurance Co., 184 Va. 54, 34 S.E. 2d 385 (1945) (where remuneration of debit collectors varied in direct relation to collectors' efforts, held such remuneration amounted to commissions [notwithstanding $20 minimum] and exclusion applicable); American Life and Accident Insurance Co. of Kentucky v. Jones, C.C.H., U.I. Serv., Ohio, par. 8217 (1948). In the latter case, the court originally held that the debit collectors engaged in "employment," C.C.H., U.I. Serv., Ohio, par. 8212 (1948); but on rehearing, the court changed its mind, principally on the strength of the Supreme Court's reasoning in the Commercial Motor Freight case, 143 Ohio St. 127, 54 N.E. 2d 297 (1944).

Other categories in which there is a difference of opinion include salesmen of aluminum wear,[112] cemetery lots,[113] magazine subscriptions,[114] and advertising space.[115] Salesmen of pottery,[116] flooring,[117] and bottled water[118] are not within the scope of the definition of employment, according to the courts, but those soliciting customers for the following products are: livestock feed,[119] clothing,[120] books,[121] ice cream,[122] paper,[123] portraits,[124] prescrip-

[112] In employment: *In re* Foy, 10 Wash. 2d 317, 116 P. 2d 545 (1941); *In re* Gnerich, 266 App. Div. 812, 41 N.Y.S. 2d 292 (1943).

Not in employment: Aluminum Cooking Utensil Co. v. Gordon, 393 Ill. 542, 66 N.E. 2d 431 (1946); *In re* Alford, 286 N.Y. 651 (memo. 1941); *In re* Levine, 283 N.Y. 577 (memo. 1940). In the Aluminum Cooking Utensil Co. case, the "distributors" persuaded housewives to invite friends for dinner and then helped prepare the meal in Wear-Ever pots and pans. There was a minimum sales requirement, but the court was impressed by the fact that some of the distributors had other jobs, one being a city fireman, one a contractor, one a government employee, and another selling different types of merchandise. The Illinois court applied the three tests and decided that they had been met.

[113] In employment: Park Improvement Co. v. Review Bd., 109 Ind. App. 538, 36 N.E. 2d 985 (1941).

Not in employment: Beaverdale Memorial Park, Inc. v. Danaher, 127 Conn. 175, 15 A. 2d 17 (1940). In this case, the individual involved was both general manager and sales manager. It was determined that his duties as sales manager were separable and similar to those of a real estate agent, and therefore exampt.

[114] In employment: Periodical Publishers Serv. Bureau v. Bd. of Review, C.C.H., U.I. Serv., Ill., par. 1390.17 (1944) (involving the status of a crew manager); Periodical Sales Co. v. Murphy, C.C.H., U.I. Serv., Ill., par. 1390.17 (1942) involving the status of a solicitor supervised by a crew manager.

Not in employment: Meredith Publishing Co. v. E.S.C., 232 Iowa 666, 6 N.W. 2d 6 (1942); *In re* Binder, 259 App. Div. 1103, 21 N.Y.S. 2d 369 (1940).

[115] In employment: Hog Breeder, Inc. v. Director of Labor, C.C.H., U.I. Serv., Ill., par. 1390.19 (1944); *In re* Keith, 262 App. Div. 984 (N.Y. 1941).

Not in employment: *In re* Warren Mosher Co., 289 N.Y. 417 (1943).

[116] Bowman v. Atkinson, 136 Ohio St. 495, 26 N.E. 2d 798 (1940). It is not clear from this opinion whether the court is applying the three tests or the exclusion applicable to persons who are paid exclusively on a commission basis and who are masters of their own time and efforts.

[117] Donaldson v. Gordon, 397 Ill. 488, 74 N.E. 2d 816 (1947).

[118] Briggs v. E.S.C., 28 Calif. 2d 50, 168 P. 2d 696 (1946). The "distributors" in this case were selling Knoxage water, using trucks which they owned but which the company painted a uniform color. The company also furnished racks and other equipment. Prices were fixed by the company and the contract contained a restrictive covenant applicable for 1 year after the termination thereof, but the routes could be sold to others and no minimum sales requirement was imposed by the contract.

[119] Globe Grain & Milling Co. v. Ind. Comm., 98 Utah 48, 97 P. 2d 582 (1939); Moorman Mf'g v. Ind. Comm., 241 Wis. 200, 5 N.W. 2d 743 (1942).

[120] Leinbach Co. v. Bd. of Review, 146 Pa. Super. 237, 22 A. 2d 57 (1941); Cameron v. Murphy, C.C.H., U.I. Serv., Ill., par. 1390.04 (1942); Buchsbaum & Co. v. Murphy, C.C.H., U.I. Serv., Ill., par. 1390.43 (1944).

[121] Richards v. Murphy, C.C.H., U.I. Serv., Ill., par. 1390.23 (1944).

[122] Jack & Jill, Inc. v. Tone, 126 Conn. 114, 9 A. 2d 497 (1939).

tions,[125] newspapers,[126] tea and spices,[127] roofing materials,[128] collection services,[129] neon signs,[130] and comptometers.[131]

Many of the cases determining that particular salesmen were not within the definition of "employment" have stressed the fact that the salesman is free to pursue his own methods and cannot be controlled as to the manner in which he performs his services. This is true, of course, by the very nature of the salesman's job. He is directly in contact with the consumer and his methods, more often than not, are peculiarly his own. When actually making sales, he is usually away from the office or factory. His freedom in this respect, however, is no greater than that of many individuals who may be employees without question. The captain of a ship or the pilot of a commercial aircraft, for instance, is complete master while he is at sea or aloft. Any highly skilled worker or trained technician may be equally above supervision or control in the limited sense and yet unquestionably be in the employ of the concern for whom the services are performed.

As a practical matter, the attempt to determine the true nature of a particular relationship through the application of the control test is as fruitless as the legendary search for the Holy Grail. Inconsistency in results by no means began with the advent of modern social legislation,[132] but the inadequacy of control as a cri-

---

[125] Brewer v. Gordon, C.C.H., U.I. Serv., Ill., par. 1390. 28 (1945).

[126] Marshall Photographer, Inc. v. Murphy, C.C.H., U.I. Serv., Ill. par. 1390.18 (1942). These solicitors sold in the evening and carried business cards identifying them as representatives of the photographer.

[127] Glasgow v. Murphy, C.C.H., U.I. Serv., Ill., par. 1390.16 (1942).

[128] *In re* Todd, 260 App. Div. 826, 22 N.Y.S. 2d 393 (1940); Walkowick v. Murphy, C.C.H., U.I. Serv., Ill., par. 1390.173 (1944).

[129] *In re* Goebber, 262 App. Div. 1053 (1941). The court stressed the fact that the company fixed the prices, the salesman sold only the company's products, and in soliciting orders he held himself out as representing the company.

[130] Wolfe v. Bates, C.C.H., U.I. Serv., Wash., par. 1390.018 (1940); Garner v. Gordon, C.C.H., U.I. Serv., Ill., par. 8258 (1947)

[131] North American Credit Corp. v. Murphy, C.C.H., U.I. Serv., Ill., par. 1390.25 (1943).

[132] Twentieth Century Lites, Inc. v. Dep't of Empl., 28 Cal. 2d 56, 168 P. 2d 699 (1946).

[133] Felt & Tarrant Mf'g Co. v. Tone, C.C.H., U.I. Serv., Conn., par. 1390.039 (1939).

[134] No attempt has been made in this article to collect or analyze the personal injury and workmen's compensation cases, although some of them have been used for purposes of comparison. As an example, however, it has been held that corner newsboys are independent contractors. Balinski v. Press Publishing Co., 118 Pa. Super. 89, 179 Atl. 987 (1935); N.Y. Indemnity Co. v. Industrial Accident Comm., 213 Cal. 43, 1 P. 2d 12 (1931). Newsboys engaged in home delivery, however, are considered employees. Hann v. Times-Dispatch Pub. Co., 166 Va. 102, 184 S.E. 183 (1936); Press Pub. Co. v. Industrial Accident Comm., 190 Cal. 114, 210 Pac. 820 (1922). In the N.Y. Indemnity Co.

terion has been brought into sharper focus by new problems and greater stress as a result thereof. So long as this test retains its present prominence, it is submitted that confusion and uncertainty will inevitably continue.

What is more, the control test is as inappropriate as it is unreliable.[133] No one has yet satisfactorily explained what possible connection it could have with an individual's right to participate in the unemployment insurance program or to receive the protection of wage and hour legislation. The significance of the right of control is questionable even in the workmen's compensation program when viewed in the light of its social aspects. The difficulties of maintaining pay roll records, of determining when the individual is acting within the scope of his employment, or deciding when he is unemployed, are factors which have a realistic bearing upon the question of whether or not particular groups or types of workers should be brought within the scope of a particular program. Such considerations have an understandable bearing upon the problem facing the legislative body, but not so with control.

The prominent position of the control criterion in the typical 3-test provision is undoubtedly responsible for much of the difficulty which that provision has encountered. A further difficulty, however, is created by the introductory language which refers to services for wages or under a contract of hire. There is a growing tendency to use this language as the principal guide and to refer to the 3-test provision in a more or less perfunctory manner, the case already having been decided for all practical purposes.[134]

---

case *supra*, the final decision was made in a per curiam opinion, on rehearing, after the court had reached exactly the opposite result in its original consideration of the application of the control test to the identical set of facts. See, Note, *Scope of the Term "Employee,"* 32 CALIF. L. REV. 289 (1946).

[133] See: Leidy, *Salesmen as Independent Contractors*, 28 MICH. L. REV. 365 (1930); Stevens, *The Test of the Employment Relation*, 38 MICH. L. REV. 188 (1939); Wolfe, *Determination of Employer-Employee Relationships in Social Legislation*, 41 COL. L. REV. 1015 (1941). James H. Wolfe, the author of the latter article, was member of the Supreme Court of Utah during the period when the Utah decisions in this field were being made. He wrote the opinion of the court in Globe Grain & Milling Co. v. Ind. Comm., 98 Utah 48, 97 P. 2d 582 (1939), dissented from the opinion of the majority in the Fuller Brush case, 99 Utah 97, 104 P. 2d 201 (1940), and subsequently concurred, as Chief Justice, in the opinion of the majority in Singer Sewing Machine Co. v. Ind. Comm. 104 Utah 175, 134 P. 2d 479 (1943).

[134] See, Donaldson v. Gordon, 397 Ill. 488, 74 N.E. 2d 816 (1947); Singer Sewing Machine Co. v. Ind. Com., 104 Utah 175, 134 P. 2d 479 (1943); Moorman Mf'g Co. v. Ind. Comm., 241 Wis. 200, 5 N.W. 2d 743 (1942); Mt. Pleasant Cab Co. v. U.C.B., 53 A. 2d 485 (R.I. 1947); George J. Wolff Co. v. Riley, 24 Wash. 2d 62, 163 P. 2d 179 (1945); Texas Co. v. Bryant, 178 Tenn. 1, 152 S.W. 2d 627 (1941); Sisk v. Ariz. Ice & Coal Storage Co., 60 Ariz. 496, 141 P. 2d 395 (1943); McCain v. Crossett Lumber Co., 206 Ark. 51, 174 S.W. 2d 114 (1943); Leinbach Co. v. Bd. of Review, 146 Pa. Super. 237, 22 A. 2d 57 (1941).

All of which suggests an urgent need for a more practical and appropriate criterion for the employer-employee relationship.

A number of proposals have already been made. The Restatement of the Law of Agency, in connection with the problem of determining tort liability, uses control, or the rght to control, as the primary test, but lists nine factors which, "among others," are entitled to consideration in making a determination.[135] The United States Supreme Court, in suggesting the five or six factors outlined in its opinion in the *Silk* case, previously discussed herein, has adopted a very similar approach. One writer has urged more emphasis on the "independent calling" test,[136] while another prescribes a "quantitative criterion," which would take into account the administrative difficulties involved in covering particular groups.[137] For the purpose of proposed national health insurance legislation, the term "employee" has been defined to include "(in addition to any individual who is a servant under the law of master and servant) any individual who performs service, of whatever nature, for a person, unless the service is performed by the individual in pursuit of his own independently established business."[138]

The independent profession or business test has been mentioned specifically and used effectively in a number of the unemployment insurance cases, several of them under state laws which did not

---

[135] RESTATEMENT, AGENCY § 220 (1933). Cf. Murray's Case, 130 Me. 181, 154 Atl. 352 (1931). The nine factors are: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation of business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; and (i) whether or not the parties believe they are creating the relationship of master and servant.

[136] Wolfe, *Determination of Employer-Employee Relationships in Social Legislation*, 41 COL. L. REV. 1015 (1941).

[137] Stevens, *The Test of the Employment Relation*, 38 MICH. L. REV. 188 (1939). In the words of the author: "From an administrative viewpoint, the characteristics of an employment to be included in the compensation system will be those necessary to economical and practical application of insurance. The most essential would seem to be the centralization of enough employment or risk about a single 'employer' so that it will be both possible and economical to collect premiums and otherwise administer accounts." *Id* at 201. See, also, Douglas, *Vicarious Liability and Administration of Risks*, 38 YALE L. J. 584 (1929).

[138] Sec. 281(f), S. 5, 81st Congress; § 781(f) S. 1679, 81st Congress. In addition, the definition specifically provides that the term shall also include an officer of a corporation.

contain the specific language of the 3-test provision.[139] Another test which has been mentioned almost as frequently hinges the determination upon whether or not the services in question are an essential or integral part of the business involved.[140] The latter sounds very much like the "economic reality" test suggested by the United States Supreme Court in the *Hearst* and *Silk* cases. It is a practical criterion, and one which should not be difficult for the courts and administrative agencies to use. It could be applied without reference to the details of any contract between the parties and would not be affected by such matters as the ownership of equipment. The principal inquiry would concern the extent of the business involved, the way in which it operates, and the function of the particular services with reference thereto. The test would be satisfied if the services were an essential or inherent part of the business as a whole. Moreover, this test would not sound like the independent contractor test and thus would not be likely to become engulfed in the confusion of the existing precedents. These are distinct advantages over the independent calling test.

Probably, however, the only way to clear the air and get a fresh start is by specific legislative definition. The following language would be appropriate for this purpose:

> An "employee," for the purpose of this act, includes, in addition to those recognized as such under the traditional common law concepts, any person who performs service, personal or otherwise, for another as an integral part of such other's business.

If the service is an integral part of the business for which it is performed, there can be no reasonable objections to any tax or other burdens imposed as a result thereof. There is no vested right

---

[139] New York Life Ins. Co. v. Murphy, 388 Ill. 316, 58 N.E. 2d 182 (1944); Singer Sewing Machine Co. v. U.C.C., 167 Ore. 142, 116 P. 2d 744 (1941); Life & Casualty Ins. Co. v. U.C.C., 178 Va. 46, 16 S.E. 2d 357 (1941); Tomlin v. Empl. Comm., 30 Cal. 2d 34, 180 P. 2d 342 (1947) (without three tests); Schomp v. Fuller Brush Co., 124 N.J.L. 487, 12 A. 2d 702 (1941), *aff'd*, 126 N.J.L. 368, 19 A. 2d 780 (1941); Robert C. Buell & Co. v. Danaher, 127 Conn. 606, 18 A. 2d 697 (1941) (without three tests); *In re Dunne*, 293 N.Y. 780 (1944) (without three tests); Northern Oil Co. v. Ind. Comm., 140 P. 2d 329 (Utah 1943); Rahoutis v. U.C.C., 171 Ore. 93, 136 P. 2d 426 (1943); U.C. Div. v. Hunt, 22 Wash. 2d 897, 158 P. 2d 98 (1945); Walkowick v. Murphy, C.C.H., U.I. Serv., Ill., par. 1390.173 (1944); Kansas v. U.C.C., 230 Iowa 860, 299 N.W. 415 (1941).

[140] Brenner v. State, 201 P. 2d 236 (Okla. 1948); Tomlin v. Empl. Comm., 30 Cal. 2d 34, 180 P. 2d 342 (1947); Union Dry Goods Co. v. Cook, 71 Ga. App. 708, 32 S.E. 2d 190 (1944); Ice Service Co. v. Goss, 212 S.W. 2d 933 (Ark. 1948); Arizona Lumber & Timber Co. v. E.S.C., C.C.H., U.I. Serv., Ariz., par. 8101 (1944); U.C.C. v. Collins, 182 Va. 426, 29 S.E. 2d 388 (1944); *In re* Electrolux Corp., 288 N.Y. 440, 43 N.E. 2d 480 (1942); Northern Oil Co. v. Ind. Comm., 140 P. 2d 329 (Utah 1943).

in any particular definition of the term "employee," and constitutional provisions which use the term do not specify the standards by which it must be measured.[141] The legislature is clearly free to prescribe its own definition, unlimited by existing criteria or categories.[142]

Considering the social aspects of the various programs that have been mentioned, it would be desirable to bring as many groups as possible within the scope thereof. Also, from an administrative standpoint, it would be simpler and more certain to deal with a single large business enterprise than with a scattered group of so-called contractors. It is likely, however, that some State legislatures, for reasons of their own, may not wish to go as far as the suggested definition, or the independent business test, would take them. In the unemployment insurance field, an increasing number of States have adopted specific exceptions in addition to the standard ones originally copied from the Social Security Act,[143] and at least nine of them have either abandoned or modified the 3-test provision.[144] The 80th Congress exhibited a similar frame of mind, adopting the Gearhart Resolution over the President's veto[145] and

[141] The Ohio Constitution, Article II, section 34, provides that laws may be passed providing for the comfort, health, safety, and general welfare of all employees. According to the Ohio Court of Appeals, the purpose of this provision was to allay all doubt as to the right of the legislature to enact subsequent legislation respecting those who were employed by others. State v. Iden, 71 Ohio App. 65, 47 N.E. 2d 907 (1942).

[142] U.C.C. v. National Life Ins. Co., 219 N.C. 576, 14 S.E. 2d 689 (1941); Singer Sewing Machine Co. v. U.C.C., 167 Ore. 142, 116 P. 2d 744 (1941).

[143] Insurance agents and newsboys are the additional groups most commonly excepted.

[144] The 3-test provision has been removed entirely from the unemployment insurance laws of Arizona, Colorado, Florida, Michigan, and North Carolina. The provision was effectively neutralized in Arkansas by changing the conjunctive to the disjunctive and inserting a specific requirement that the master-servant relationship must exist. In Minnesota, a reference to the master-servant relationship was inserted in 1939 and in 1945 the "A B C" test was completely eliminated and a provision substituted which defines employment as the relation of master and servant or the relation which exists when one person performs services for another, unless such services are performed in the course of the workmen's independently established business or unless he is in fact an independent contractor. Wisconsin dropped the second test, relating to the regular course of the employer's business, and Oklahoma changed the connection between the second and third tests from the conjunctive to the disjunctive. The reasons for this action are not entirely clear, but it is significant that in the cases of Colorado, Michigan, and North Carolina, the elimination occurred after the state courts had adopted interpretations which gave full effect to the provision. Florida, on the other hand, never did give the provision its intended effect.

[145] Act of June 14, 1948 (Public Law 642, 80th Congress), previously discussed herein. Several bills to repeal this amendment have been introduced during the present Congress, including H.R. 2893, the administration's bill on

adding a new exception applicable to newsboys over 18 years of age.[146] Wherever this is the case, it is submitted that the preferable approach is to adopt a broad general definition along with specific exclusions designed to eliminate those categories which are deemed inappropriate for protection under the act in question. This would eliminate uncertainty and discrimination within particular groups or categories based on artificial criteria and without the benefit of considered legislative judgment.

In any event, the problem is becoming acute and major surgery is indicated.

social security which has been the subject of lengthy hearings before the House Ways and Means Committee. It remains to be seen what the 81st Congress will do on this subject.

[146] Act of April 20, 1948 (Public Law 492, 80th Congress).